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No. 02-1235

IN THE
SUPREME COURT OF THE UNITED STATES

GREENVILLE WOMEN'S CLINIC, et al.,
Petitioners,

v.

COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN PUBLIC HEALTH ASSOCIATION, AND SOUTH CAROLINA MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

DAVID S. COHEN
(*Counsel of Record*)
SUSAN FRIETSCHE
WOMEN'S LAW PROJECT
125 South Ninth Street
Suite 300
Philadelphia, PA 19107
(215) 928-9801

24 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), *Amici Curiae* move for leave to file the attached brief in support of the Petition for Writ of Certiorari filed by Greenville Women's Clinic, et al., seeking review of *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, 306 F.3d 141 (4th Cir. 2002).

In support of this Motion, *Amici Curiae* state as follows:

1. *Amici Curiae* are three medical and public health organizations whose members will be directly affected by the challenged regulation.

2. *Amicus Curiae* American College of Obstetricians and Gynecologists is a private, voluntary, not-for-profit organization representing over 90% of all obstetricians and gynecologists currently practicing in the United States, including almost 600 members in South Carolina.

3. *Amicus Curiae* American Public Health Association is a national organization devoted to the promotion and protection of personal and environmental health and representing over 50,000 public health professionals.

4. *Amicus Curiae* South Carolina Medical Association is the primary professional association for individuals licensed to practice medicine in South Carolina and has over 5500 members representing all medical specialties that provide medical services to the citizens of the state.

5. *Amici Curiae* each have expertise in the proper maintenance of individually identifiable medical records.

6. *Amici Curiae* seek permission to submit this Brief in order to assist the Court in its consideration of Petitioners' first question presented for review—whether the challenged regulation violates the constitutional right to informational privacy. Specifically, *Amici Curiae* seek to highlight the importance of confidentiality to the medical profession

generally as well as to the provision of reproductive health care in particular.

7. *Amici Curiae* have sought consent of the parties to the filing of this Brief. Petitioners have consented to the filing of the Brief, and Respondents have denied consent.

For the foregoing reasons, *Amici Curiae* respectfully move for leave to file the attached Brief *Amici Curiae* in Support of Petitioners.

Respectfully submitted,

DAVID S. COHEN
(*Counsel of Record*)
SUSAN FRIETSCHE
WOMEN'S LAW PROJECT
125 South Ninth Street
Suite 300
Philadelphia, PA 19107
(215) 928-9801

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STATEMENTS OF INTEREST[1]

Amicus Curiae American College of Obstetricians and Gynecologists (ACOG), founded in 1951, is a private, voluntary, not-for-profit organization and the leading group of professionals providing health care to women. ACOG's more than 45,000 members represent over 90% of all obstetricians and gynecologists currently practicing in the United States, including almost 600 members in South Carolina. ACOG is dedicated to educating health care professionals, law and policy makers, and the general public about women's health care. ACOG supports women's confidential access to reproductive health services and supports strong legal protection for records that contain private medical information. ACOG submits this brief out of concern that the challenged South Carolina regulation jeopardizes the health of South Carolina women by compromising their right to confidential health care.

Amicus Curiae American Public Health Association (APHA) is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health, including maternal and child health. APHA strives to improve public health for everyone by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies. APHA believes patient confidentiality is essential to ensuring that patients receive timely and appropriate medical treatment, including reproductive health services.

Amicus Curiae South Carolina Medical Association (SCMA) is the primary professional association for

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[1] No entity or counsel apart from those whose names appear on this Brief have contributed monetarily or substantively to its production. Sup. Ct. R. 37.6.

individuals licensed to practice medicine in South Carolina. The SCMA has over 5500 members representing all medical specialties that provide medical services to the citizens of the state. The SCMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in South Carolina. To this end, SCMA opposes policies and practices, like the regulation at issue here, that undermine patient confidentiality and weaken the trust between health care providers and patients that promotes positive treatment outcomes.

SUMMARY OF ARGUMENT

This Court should review the decision of the U.S. Court of Appeals for the Fourth Circuit because of the harmful impact that decision will have on the practice of medicine generally and the provision of reproductive health services specifically. South Carolina Regulation 61-12 § 102(F)(2) (the disclosure provision) plainly violates basic principles of medical confidentiality recognized as essential to the practice of medicine by leading medical and public health organizations in the United States.

Compromising patient confidentiality will impair the atmosphere of honesty and openness that physicians must create if they are to convince their patients to trust them with the sensitive personal information needed to provide appropriate treatment. Nowhere is this trust more critical than in the provision of gynecological and reproductive health services. Indeed, as this Court has repeatedly recognized, the denial of confidentiality in the provision of reproductive health services amounts, for many women, to the denial of the right to choose altogether.

The impact of permitting the disclosure provision to stand extends well beyond the abortion context. For women affected by the provision, not only will reproductive health information be exposed but so will any other information

recorded in their files. Furthermore, because there is no limiting principle within the Court of Appeals' reasoning, the decision below is a harbinger for the erosion of doctor-patient confidentiality in all areas of medicine. As a result, patients in South Carolina and elsewhere will face the prospect of never knowing whose eyes may be inspecting their medical records.

For these reasons, and for those set forth in the Petition for Certiorari, this Court should grant the Petition.

ARGUMENT

I. The Disclosure Provision Conflicts With the Professional Ethical Guidelines and Policy Statements of Major Medical Organizations.

As detailed in the Petition for Certiorari, the Court of Appeals erred in concluding that the disclosure provision and South Carolina law[2] protect patients from the disclosure of personally identifiable medical information. *See* Pet. for Cert. at 9-11. Moreover, whether South Carolina law is read to allow only the state agency access to records, as the majority opinion of the Court of Appeals read it, or to allow broad public access to records, as Petitioners and the dissent read it, confidentiality of medical records is shattered.

Accordingly, the disclosure provision conflicts with major medical groups' policies regarding doctor-patient confidentiality. The provision would render South Carolina's obstetricians and gynecologists incapable of adhering to the Code of Conduct of the American College of

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[2] The disclosure provision gives the Department of Health and Environmental Control (DHEC) access to all clinic records and the authority to photocopy those documents. S.C. Code Ann. Regs. 61-12 § 101(F)(2). Other sections of South Carolina law give the public access to documents in DHEC's possession. *See* S.C. Code Ann. § 44-7-310; S.C. Code Ann. § 44-7-315; *see generally* Pet. for Cert. at 4, 9-11.

Obstetricians and Gynecologists (ACOG), which mandates that the physician "safeguard patient information and confidences . . . ." Am. Coll. of Obstetricians & Gynecologists, *Code of Professional Ethics of the American College of Obstetricians and Gynecologists: Code of Conduct* (2001), *available at* http://www.acog.org/from_home/acogcode.pdf.

Similarly, physicians and medical professionals in other specialties who are covered by the disclosure provision[3] will also face difficulties complying with their professional obligations. For instance, the American Academy of Family Physicians stresses the importance of confidentiality: "A confidential relationship between physician and patient is essential for the free flow of information necessary for sound medical care." Am. Acad. of Family Physicians, *AAFP Policies on Health Issues: Confidentiality, Patient/Physician* (2000), *available at* http://www.aafp.org/x6686.xml; *see also* Am. Acad. of Pediatrics, *Policy Statement: Confidentiality in Adolescent Health Care (RE9151)* (April 1998), *available at* http://www.aap.org/policy/104.html. The American Society of Internal Medicine's Ethics Manual states that "[c]onfidentiality is a fundamental tenet of medical care. It is a matter of respecting the privacy of patients, encouraging them to seek medical care and discuss their problems candidly, and preventing discrimination on the basis of their medical conditions. The physician must not release information without the patient's consent . . . ." Am. Coll. of Physicians–Am. Soc'y of Internal Med., *Ethics Manual* (4th ed. 1998), *available at* http://www.acponline.org/journals/annals/01apr98/ethicman.htm. The American Society of General Surgeons agrees that "[p]atients should not be denied

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[3] Because the disclosure provision applies to all medical records maintained by "[a]ny facility, other than a hospital, . . . in which any second trimester or five or more first trimester abortions are performed in a month," *see* S.C. Code Ann. Regs. 61-12 § 101(B), the disclosure provision affects not only physicians providing abortion services, but also physicians providing any of a wide array of general medical services in any covered facility.

the right to communicate with health care providers in confidence, and have the confidentiality of their communications (and their medical records) protected against unauthorized use." Am. Soc'y of Gen. Surgeons, *Patients' Rights: ASGS Statement of Principles* (1999), *available at* http://www.theasgs.org/about.asgs/ps/ps5.html. Also, the Code of Ethics for the American Nurses Association requires the maintenance of confidentiality of all patient information: "The patient's well-being could be jeopardized and the fundamental trust between patient and nurse destroyed by unnecessary access to data or by the inappropriate disclosure of identifiable patient information." Am. Nurses Ass'n, *Code of Ethics for Nurses with Interpretative Statements* § 3.2 (2001), *available at* http://nursingworld.org/ethics/code/ethicscode150.htm.

General ethical obligations of doctors are also contravened by the disclosure provision. The Fourth Principle of Medical Ethics of the American Medical Association (AMA) requires that "[a] physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard confidences and privacy . . . ." Am. Med. Ass'n, *Principles of Medical Ethics* (June 2001), *available at* http://www.ama-assn.org/ama/pub/category/2512.html. The World Medical Association requires the physician to "safeguard patient confidences" and "preserve absolute confidentiality on all he knows about his patient even after the patient has died." World Med. Ass'n, *World Medical Association International Code of Medical Ethics* (1983), *available at* http://www.wma.net/e/policy/17-a_e.html. The American Public Health Association stresses that "[t]he constitutional rights and privacy of individuals must be protected with respect to the accumulation and dissemination of personal information." Am. Public Health Ass'n, *Public Policy Statement 6608* (1966), *available at* http://www.apha.org/legislative/policy/PDF/66Policy.pdf.

These overarching obligations applicable to all doctors stem from the Hippocratic Oath: "What I may see or hear in the course of the treatment or even outside of the treatment in

regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about." Hippocratic Oath (quoted in Albert R. Jonsen et al., *Clinical Ethics* 166 (4th ed. 1998)).

Guidelines specifically governing the maintenance of medical records squarely conflict with the disclosure provision. The AMA Council on Ethical and Judicial Affairs, responsible for explicating the organization's Principles of Medical Ethics, has stated unequivocally that the medical record must be given the highest protection of confidentiality: The "record is a confidential document involving the patient-physician relationship and should not be communicated to a third party without the patient's prior written consent . . . ." Council on Ethics & Judicial Affairs, Am. Med. Ass'n, *E-7.02: Records of Physicians: Information and Patients* (1994), *available at* http://www.ama-assn.org/ama/pub/category/8378.html. "[T]here exists a basic right of patients to privacy of their medical information and records," and "this right should be explicitly acknowledged." Am. Med. Ass'n, *PolicyFinder, H-315.983(1): Patient Privacy and Confidentiality* (2002), *available at* http://www.ama-assn.org/apps/pf_online/pf_online?f_n=browse&doc=policyfiles/HOD/H-315.983.HTM. By allowing government and public third parties to access patients' medical records, the disclosure provision requires what the AMA's Council on Ethical and Judicial Affairs specifically forbids.

In the limited circumstances when personal medical information must be disclosed,[4] the AMA's ethical

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[4] ACOG, the AMA, and various other organizations permit disclosure of information as required by law. However, these exceptions are narrowly circumscribed based on "overriding social considerations." Council on Ethics & Judicial Affairs, Am. Med. Ass'n, *E-5.05: Confidentiality* (1994), *available at* http://www.ama-assn.org/ama/pub/category/8353.html. Such "overriding social considerations" are generally limited to situations in which non-disclosure could seriously harm other individuals, such as when a patient threatens to inflict serious bodily harm to another or to herself or, as required by applicable reporting statutes, when a patient presents with serious communicable diseases, gun-shot and knife

guidelines require that any information disseminated "should be limited to that information, portion of the medical record, or abstract necessary to fulfill the immediate and specific purpose of disclosure," *id.* ¶ (1)(d), and should be "de-identified" whenever possible. *Id.* ¶ (4). Such disclosures "must be as narrow in scope and content as possible, must contain the least identifiable and sensitive information possible, and must be disclosed to the fewest possible to achieve the necessary end." *Id.* ¶ (8).

In direct contrast to these widely-accepted principles of medical confidentiality, the disclosure provision requires physicians to disclose all medical records maintained by facilities that fall under the regulation's definition of abortion clinic without obtaining patient consent or redacting identifying or sensitive information. Furthermore, the records must be disclosed in their entirety even when a more narrowly tailored disclosure would fulfill the purpose of the regulation. Ultimately, physicians are in an ethical and legal quandary: if they choose to obey the law, they will have to disobey the fundamental ethical principles of their profession, and if they choose to follow their field's guiding doctrines, they will be forced to disobey the law. The disclosure provision forces South Carolina physicians to violate the fundamental principles of their profession, as they cannot guarantee their patients even the most basic elements of medical confidentiality.

This Court has recognized the importance of medical confidentiality in protecting doctor-patient relationships. *See Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (stating that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent"). Because

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wounds, or indicia of child abuse. *Id.*; *see also* Am. Coll. of Obstetricians & Gynecologists, *Guidelines for Women's Health Care* 66 (2d ed. 2002). None of these "overriding social considerations" has been or could be offered as a justification for the disclosure provision.

the disclosure provision vitiates such confidentiality, this Court is urged to grant review.

II. Protecting Medical Confidentiality Is Essential to Respecting Patient Autonomy and Providing Effective Medical Care.

Confidentiality is essential to effective medical care. Without its promise, the practice of medicine becomes dangerous as patients will either avoid care altogether or be less than completely honest with health professionals, not giving doctors the complete information they need in order to make medically sound decisions.

Without assurances of medical confidentiality, patients at South Carolina abortion clinics will face all the harms that the principles of medical confidentiality exist to prevent. Respect for patient privacy protects "patient autonomy and is a prerequisite to building the trust that is at the core of the patient-physician relationship." Council on Ethics & Judicial Affairs, Am. Med. Ass'n, *E-5.059: Privacy in the Context of Health Care* (2002), *available at* http://www.ama-assn.org/ama/pub/category/8623.html. As the American Association of Family Practitioners has stated, "[o]nly in a setting of trust can a patient share the private feelings and personal history that enable the physician to comprehend fully, to diagnose logically and to treat properly." Am. Acad. of Family Physicians, *AAFP Policies on Health Issues: Confidentiality, Patient/Physician* (2000), *available at* http://www.aafp.org/x6686.xml. Without that trust, patients will not be completely candid with their doctors, which could result in patients withholding "information vital to their care or [being] reluctant to seek care altogether." Patricia I. Carter, *Health Information Privacy: Can Congress Protect Confidential Medical Information in the "Information Age"?*, 25 William Mitchell L. Rev. 223, 232 (1999).

Furthermore, "unauthorized disclosure of information could result in embarrassment, stigma, and discrimination." Lawrence O. Gostin, *Legislative Survey of State Confidentiality Laws* at § III (1997), *at* http://www.epic.org/

privacy/medical/cdc_survey.html. Medical records may contain a wide range of highly sensitive information, such as information indicating that the patient suffers from cancer, heart disease, substance abuse and addiction, or a psychiatric problem. Gynecological records in particular may contain detailed information about the patient's sexual practices, disclosures about the patient's sexual orientation, and details about contraceptive usage, menstrual cycles, sexual dysfunction, fertility problems, or sexually transmissible infections. Medical records of sexual assault survivors may contain photographs of the victim's injuries and detailed accounts of her psychological and physical condition. Should the disclosure provision stand, conscientious doctors will hesitate to record such sensitive information in their patient's medical chart because of the likelihood that it will become public.

Under the disclosure provision, South Carolina doctors cannot guarantee that sensitive and identifiable information about their patients will remain confidential. The trust they need to establish with their patients will be tainted, if not destroyed. Giving the state and inquisitive South Carolinians unfettered access to individuals' medical records, as the disclosure provision does, will cause significant harm. Because of the grave consequences that approval of the disclosure provision could have on the practice of medicine, *Amici* urge this Court to grant certiorari.

III. This Court Should Grant Certiorari Because Protecting the Confidentiality of Medical Treatment Information Is of Paramount Importance in the Provision of Reproductive Health Services.

As critically important as the privacy of medical treatment information is generally, it is even more vital in the context of reproductive health services. This Court's abortion jurisprudence has zealously protected abortion decisions from disclosure to others as well as from direct interference by the state. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 900-01 (1992); *Bellotti v. Baird,* 443 U.S. 622 (1979). This

vigilance is appropriate and necessary: reproductive health care decisions are by their nature uniquely personal, often revolving around intimate family considerations and engaging the patient's most profound convictions and beliefs. Indeed, this Court has recognized that these choices about family and personal destiny lie at the heart of one's self-definition. *Casey*, 505 U.S. at 856.

Strict confidentiality of abortion information is also necessary because women's ability to obtain an abortion depends upon it, much in the same way that a secret ballot is integral to the protection of the right to vote. For some vulnerable patients, disclosure or the threat of disclosure will prevent them from obtaining an abortion altogether; for others, the price of exercising their right will be damage to career or educational goals, harassment and abuse, or outright physical assault and bodily injury. If the Court of Appeals' decision is permitted to stand, doctors will face untenable conflicts between their duty to protect their patients' welfare and the duties imposed on them by law.

A. Women Who Choose Abortion Will Face the Threat of Harassment, Violence, and Discrimination If Their Decision Is Made Public.

Women and their doctors face the threat of harassment and violence if their abortion decision is made public. As the Senate Committee report accompanying the Freedom of Access to Clinic Entrances Act noted, "[a] nationwide campaign of anti-abortion blockades, invasions, vandalism and outright violence is barring access to facilities that provide abortion services and endangering the lives and well-being of the health care providers who work there and the patients who seek their services." Senate Comm. on Labor & Human Resources, 103d Cong., *Report on Freedom of Access to Clinic Entrances Act (S. 636)* 3 (1993) (subsequently enacted at 18 U.S.C. § 248) (noting that from 1977 to April 1993, more than 1,000 acts of violence against abortion providers were reported in the United States, including at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and over

6,000 clinic blockades). Nor has this violence ended: since 1993, there have been thousands of violent offenses against abortion providers, including bombings, arsons, chemical attacks, and anthrax threats. *See* Nat'l Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers* (Dec. 31, 2002), *at* http://www.prochoice.org/; *see also* Carol Mason, *Killing for Life: The Apocalyptic Narrative of Pro-Life Politics* (2002).

Women whose identities are known to anti-abortion protesters are highly likely to face harassment and the loss of all personal privacy about their decision. *See* App. 34 (protesters using 15-year old's medical record); Rachel L. Braunstein, *A Remedy for Abortion Seekers Under the Invasion of Privacy Tort*, 68 Brook. L. Rev. 309, 309-10 (2002) (describing website that posts the pictures of individual women seeking abortions). As this Court has seen in the record of past cases, women who are harassed and threatened prior to their abortion procedures can suffer negative health consequences as a result. *Madsen v. Women's Health Center*, 512 U.S. 753, 758 (1994) (noting toll protests and harassment take on patients seeking abortion).

Women who seek abortion services are also subjected to discrimination based on their decision. Indeed, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), was enacted in order to address widespread discrimination against women on the basis of the condition of pregnancy, including discrimination based on an individual's abortion decisions. *See EEOC Questions & Answers*, 29 C.F.R. 1604 app. at 204; *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996); *Doe v. First Nat'l Bank of Chicago*, 668 F. Supp. 1110, 1113 (N.D. Ill. 1987), *aff'd without deciding issue* 865 F.2d 864 (7th Cir. 1989). Should the decision below be permitted to stand, South Carolina women seeking abortion services can contemplate that, if their decision is revealed to their employer, landlord, neighbors, or school principal, they may face the same discriminatory conduct inflicted on the plaintiffs in the cases cited above.

B. Domestic Violence and Sexual Assault Survivors Seeking Reproductive Health Services Will Face Serious Danger If Their Medical Records Are Made Public.

For some women seeking reproductive health services, disclosure can have catastrophic consequences. Domestic violence is one of the nation's most pervasive public health problems. As detailed by this Court, domestic violence affects millions of women every year. *See Casey*, 505 U.S. at 887-94. The National Institute of Justice and the Centers for Disease Control and Prevention estimate that 25% of women have been physically assaulted and/or raped by a current or former spouse, cohabiting partner, or date at some time in their lives. Patricia Tjaden & Nancy Thoennes, National Institute of Justice/Centers for Disease Control and Prevention, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 2, 12 (1998). Domestic violence is often lethal: 30% of women killed in the United States were murdered by their husbands or partners. U.S. Dep't of Justice, Bureau of Justice Statistics, *Intimate Partner Violence* 1 (2000) (reporting that the percentage of female murder victims killed by intimate partners has remained at about 30% since 1976). So pervasive is the problem that ACOG recommends universal screening of all female patients for domestic abuse: "Because of the prevalence of violence, being female is a significant enough risk factor to warrant screening every patient at periodic intervals, such as annual examinations and new patient visits." ACOG Educational Bulletin No. 257 at 3, *in* 94(6) *Obstetrics & Gynecology* (Dec. 1999).

When a patient discloses that she is a victim of domestic violence, confidentiality is absolutely essential to protect her from retaliatory assaults. ACOG's educational materials counsel physicians to alter their billing and patient contact procedures to ensure that the battered patient's confidentiality is not breached: "Because perpetrators often retaliate when they suspect disclosure of abuse, every effort

should be made to maintain confidentiality, especially regarding telephone calls or when materials, such as bills, are sent to the patient." *Id.* at 5.

When medical treatment includes reproductive health care, ensuring the patient's medical privacy is particularly important. Acknowledging the danger that domestic violence survivors face from their abusers, this Court has recognized the importance of maintaining the confidentiality of a decision to obtain an abortion for women in a relationship infused with violence:

> Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, [may] fear notifying their husbands will provoke further instances of child abuse, [or] may fear devastating forms of psychological abuse[,] including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends.

Casey, 505 U.S. at 893. Confidentiality, in these situations, is "critical to ensuring a woman's safety." *See* Am. Coll. of Obstetricians & Gynecologists, *Guidelines for Women's Health Care* 15 (2d ed. 2002). The disclosure provision denies this necessary confidentiality and thus brings about the harms this Court has recognized as important to avoid.

The disclosure provision also presents a troubling dilemma for doctors who are faced with deciding how they should document a history of domestic abuse in patients' medical records. Physicians play a critical role in the identification of domestic violence and intervention on behalf of the victim, and accurate documentation of domestic violence can assist a victim in putting an end to the abuse.

Documentation will assist her, for example, in getting a protection order and other medical, legal, and social services that may save her life and the lives of her children; it will also permit her to avail herself of the Family Violence Option, a welfare option that protects domestic violence survivors from the dangers of complying strictly with welfare program requirements and time limits. *See* 42 U.S.C. § 602(a)(7); Temporary Assistance for Needy Families Program, 62 Fed. Reg. 62124, 62128-29 (Nov. 20, 1997). In addition, medical record documentation "can help validate the recurrent nature of the problem and provide important supportive evidence in the courtroom." ACOG Educational Bulletin No. 257, *supra*, at 5.

However, faced with the disclosure provision, practitioners may deliberately keep important information about domestic violence out of a patient's medical record if they determine that the patient will be exposed to greater danger from disclosure of the medical record. Failing to keep accurate and complete records about domestic violence not only will harm the patient in her pursuit of services to which she is entitled, but is also contrary to the best practices of the medical profession and conflicts with the advice of the nation's leading public health authorities and domestic violence experts. *See, e.g.*, ACOG Educational Bulletin No. 257, *supra*, at 5; Am. Med. Ass'n, PolicyFinder, *H-515.965(3)(i): Family and Intimate Partner Violence* (2000), *available at* http://www.ama-assn.org/apps/pf_online/pf_online?f_n=browse&doc=policyfiles/HOD/H-515.965.HTM.

Similarly, doctors face a conflict between their professional obligations and the disclosure provision when treating indigent rape and incest survivors. Rape is largely unreported. *See* Callie Rennison, *Bureau of Justice Statistics: National Crime Victimization Survey: Criminal Victimization 2001* at 10 (2002) (indicating rape is most underreported violent crime, with just under 39% being reported to police). The two most frequently cited reasons for this underreporting are that women believe that the incident is a private matter or they fear reprisals from the

rapist. *See* Callie Marie Rennison, *Bureau of Justice Statistics: Selected Findings: Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000* at 3 (2002).

Yet both federal and state law entitle indigent women receiving their health care through the Medical Assistance Program to obtain a funded abortion if their pregnancy was caused by rape. *See* Hyde Amendment, Pub. L. No. 107-116, 115 Stat. 2177 (2002); S.C. Code Ann. § 1-1-1035. Recognizing that many women who have been sexually assaulted are unable to make a police report for physical or psychological reasons, both federal and state law permit the patient to qualify for a funded abortion without making a police report if the physician documents that the patient is unable to report due to physical or psychological reasons. *See* S.C. Dep't Health & Human Servs., Medicaid Bulletin: Abortion Statement (July 21, 1999); 1999 S.C. Acts 100 § 72.87 (1999); *see also Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995). However, because the disclosure provision subjects the medical records of rape victims seeking reproductive health services to possible public scrutiny, doctors will face a dilemma: they can either document the rape in the unprotected medical record that may well become public, or they can advise their patient that the risk of public disclosure is too great and the patient should forego public funding. The latter option would likely delay the procedure, thus increasing the health risks associated with it, while the patient struggles to raise the fee for the abortion through other means.

CONCLUSION

The disclosure provision places physicians in an untenable bind: if they competently and diligently practice their profession, they may expose their patients and themselves to serious risks; and if they attempt to minimize those risks, they may be compromising the care they give their patients. For this and all the foregoing reasons, as well

as those contained in the Petition for Certiorari, *Amici Curiae* respectfully request that this Court grant the Petition.

Respectfully submitted,

DAVID S. COHEN
(*Counsel of Record*)
SUSAN FRIETSCHE
WOMEN'S LAW PROJECT
125 South Ninth Street
Suite 300
Philadelphia, PA 19107
(215) 928-9801